

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN SUTTON, GAIL SUTTON and
DANIELLE SUTTON,

No C 06-0472 VRW

Plaintiffs,

v

KATHLEEN LLEWELLYN, Individually
and DBA HAWLEY AND LLEWELLYN,
LLC; ALBERT NICORA, Individually
and DBA NICORA AND MINOR, LLC;
JAVAID SHEIKH; LISA GALDOS,
Individually and in her official
capacity as Court Executive
Officer,

ORDER

Defendants.

Defendant Albert Nicora has moved for judgment on the pleadings under FRCP 12(c). Doc #53. Also, plaintiffs have filed six motions for leave of court to enforce subpoenas directed to (1) Ann Sydes dba A&A Auction (Doc #54), (2) Ombudsman Alliance on Aging (Doc #55), (3) Scarr Moving and Storage (Doc #59), (4) State Farm Insurance Company (Doc #60), (5) Adult Protective Services Department of Social Services (Doc #61) and (6) Monterey Transfer and Storage (Doc #62).

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1 In addition, by the court's order of October 10, 2006
2 (Doc #63), plaintiffs were given leave to amend their medical
3 malpractice and defamation claims against defendant Javaid Sheikh.
4 Plaintiffs have notified the court that they do not intend to
5 amend. Doc #71.

6 The court has reviewed memoranda from both sides on
7 Nicora's motion for judgment on the pleadings and has considered
8 plaintiffs' motions for leave of court to enforce subpoenas and
9 finds it appropriate for decision on the papers without oral
10 argument. For the reasons stated herein, Nicora's motion for
11 judgment on the pleadings is GRANTED and plaintiffs motions for
12 leave to amend to enforce subpoenas are DENIED.

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14 I

15 The instant action is one of four cases filed in this
16 court arising from the conservatorship proceedings opened in 2003
17 in Monterey county concerning the late Letitia Breng Rose. See
18 also CAND No C-04-4176 (Rose v Hogan); CAND No C-05-4469 (Sutton v
19 Teets); CAND No C-06-6417 (Sutton v Sokotowski). Plaintiffs John,
20 Gail and Danielle Sutton are Rose's son-in-law, daughter and
21 granddaughter respectively. Doc #1 ¶2.

22 In January 2004, the Monterey county superior court
23 appointed Kathleen Llewellyn as counsel to Rose in her
24 conservatorship proceeding. Doc #1 ¶20. On April 30, 2004, the
25 superior court granted Llewellyn's request to withdraw as counsel
26 and appointed Nicora as her replacement. Doc #1 ¶21. Nicora
27 remained Rose's counsel until she passed away on October 16, 2005.
28 Doc #67 at 2-3.

1 Plaintiffs claim that in a "devious [and] diabolical scam
2 to defraud Mrs Rose, the estate and [plaintiffs]," Nicora
3 bankrupted the estate and "cruelly kept [Rose] away from her own
4 home and family." Doc #1 ¶¶2, 10, 65, 74, 78.

5 Plaintiffs allege that as sole beneficiaries of Rose's
6 estate, they suffered financial harm when Nicora sold Rose's
7 furniture and other property and authorized the spending of
8 unnecessary amounts of money. Doc #1 ¶¶2, 28, 69-70, 75. For
9 example, plaintiffs allege that Nicora "let [Rose] pay out of
10 pocket \$1,000 a month for dangerous drugs" when she "had a right to
11 an HMO medical plan that would have covered her drugs," "allowed
12 [Rose] to pay huge fees to State Farm [Insurance Company] for
13 furniture that was worth \$30,000 not \$300,000," and "forced [Rose]
14 to remain in an institution for \$11,000 a month when she wanted
15 out." Doc #1 ¶¶69-70, 75.

16 In addition, plaintiffs allege they suffered emotional
17 harm when Nicora refused to allow them to associate freely with
18 Rose prior to her death. Doc #1 ¶¶27, 66. Specifically,
19 plaintiffs allege that Nicora demanded plaintiffs post a \$100,000
20 bond before allowing Rose to visit them in New York and declined to
21 provide plaintiffs with airline tickets to visit her in California
22 (Doc #1 ¶¶25, 27, 65), and that Rose wanted to move to New York to
23 be with her family, but Nicora would not appoint plaintiffs as
24 conservators or allow her to move. Doc #1 ¶¶25, 27, 66.

25 Following Rose's death, plaintiffs, acting in propria
26 persona, brought this action on behalf of themselves and the estate
27 of Rose against Kathleen Llewellyn, individually and DBA Hawley and
28 Llewellyn, LLC; Albert Nicora, individually and DBA Nicora and

1 Minor, LLC; Javaid Sheikh; and Lisa Galdos, individually and in her
2 official capacity as Court Executive Officer. Doc #1 ¶1-6.

3 On August 11, 2006, the court granted Llewellyn and
4 Galdos's separate motions to dismiss without leave to amend (Doc
5 #7, Doc #15), denied plaintiffs' motion for entry of default
6 judgment against Sheikh and Nicora (Doc #18, Doc #25) and denied
7 plaintiffs' motion for injunctive relief against Galdos. Doc #33.
8 The court ruled, moreover, that plaintiffs lacked standing to bring
9 claims on behalf of Rose's estate. Doc #42.

10 On October 10, 2006, the court granted Sheikh's motion to
11 dismiss plaintiffs' claims against him. Doc #63.

12 II

13 The court has jurisdiction over plaintiffs'
14 constitutional claim pursuant to 28 USC § 1331. And, since
15 plaintiffs' tort claims arise out of the same conservatorship
16 proceedings as the federal claim, the court has subject matter
17 jurisdiction pursuant to 28 USC § 1367. Both federal common law
18 and California state law apply.
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20 III

21 The court turns first to Nicora's motion for judgment on
22 the pleadings.
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24 A

25 Despite plaintiffs' argument to the contrary (Doc #56 at
26 5), Nicora's motion for judgment on the pleadings is timely. Any
27 party may move for judgment on the pleadings "[a]fter the pleadings
28

1 are closed but within such time as not to delay the trial * * *."

2 FRCP 12(c). Pleadings are considered closed "when all required or

3 permitted pleadings [(as governed by FRCP 7(a))] have been served

4 and filed." William W Schwarzer, A Wallace Tashima, and James M

5 Wagstaffe, California Practice Guide Federal Civil Procedure Before

6 Trial 9:323 (Rutter Group 2006). Nicora's motion for judgment on

7 the pleadings was filed on September 14, 2006, (well after July 20,

8 2006, when the last required responsive pleading was filed) and a

9 trial date has not been set. Accordingly, Nicora's motion is

10 timely.

11 "Judgment on the pleadings is proper when the moving

12 party clearly establishes on the face of the pleadings that no

13 material issue of fact remains to be resolved and that it is

14 entitled to judgment as a matter of law." Hal Roach Studios, Inc v

15 Richard Feiner and Co, Inc, 896 F2d 1542, 1550 (9th Cir 1990). For

16 the purposes of a Rule 12(c) motion, "all allegations of fact by

17 the party opposing the motion are accepted as true, and are

18 considered in the light most favorable to that party." General

19 Conference Corporation of Seventh-Day Adventists v Seventh-Day

20 Advestist Congregational Church, 887 F2d 228, 230 (9th Cir 1989).

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22 B

23 Plaintiffs demand damages from Nicora for (1) breach of

24 fiduciary duty, (2) legal malpractice, (3) deprivation of due

25 process and fundamental rights, (4) defamation and (5) intentional

26 infliction of emotional distress. Doc #1 p 10-14, 17-18.

27 Inexplicably, plaintiffs continue to assert they have

28 standing to sue on behalf of Rose's estate. Doc #67 at 3. This

1 and another federal court have already adjudicated the issue and
2 found that plaintiffs lack standing to bring claims on behalf of
3 Rose or her estate. Doc #42 at 3-4. To the extent that
4 plaintiffs' complaint seems to allege injury to plaintiffs
5 themselves, however, the court addresses each such claim in turn.

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7 Plaintiffs' purported claims for breach of fiduciary duty
8 and legal malpractice cannot survive because plaintiffs have not,
9 and, on the facts alleged, cannot establish that Nicora breached a
10 legal duty owed to them.

11 Under California law, in order for a cause of action for
12 breach of fiduciary duty or legal malpractice to survive, plaintiff
13 must first allege defendant owed a legal duty to him. See
14 Slovensky v Friedman, 142 Cal App 4th 1518, 1528 (2006); Osornio v
15 Weingarten, 124 Cal App 4th 304, 319 (2004). Generally, an
16 attorney only owes a duty of care to his client. Osornio, 124 Cal
17 App 4th at 320, 330. A legal duty, however, may extend to a
18 nonclient when that person is the intended beneficiary of the
19 attorney's work. *Id.*

20 In determining whether a legal duty exists, the main
21 inquiry is "whether the principal purpose of the attorney's
22 retention [was] to provide legal services for the benefit of the
23 plaintiff." Osornio, 124 Cal App 4th at 320, 330 (internal
24 quotations omitted). Try as they might to characterize them
25 otherwise, plaintiffs' allegations arise entirely from Nicora's
26 performance of professional services as counsel for Rose in her
27 conservatorship proceeding. Nicora performed these legal services
28 to benefit Rose, not plaintiffs.

1 Plaintiffs claim, however, "[t]he minute that [Rose]
2 requested the right to live with her children, plaintiffs became
3 third party beneficiaries of the attorney client relationship to
4 provide legal services." Doc #56 at 3. This argument, while
5 creative, is without support in case law. Most situations in which
6 an attorney's liability is extended arise when the attorney has
7 prepared a will or trust for which the nonclient is the intended
8 beneficiary. See e g Osornio, 124 Cal App 4th 304; Garcia v
9 Borelli, 129 Cal App 3d 24 (1982); Bucquet v Livingston, 57 Cal App
10 3d 914 (1976). Finding a duty outside of the estate planning
11 context is rare. Osornio, 124 Cal App 4th at 326-327.

12 Plaintiffs' allegations are insufficient to establish
13 that they were the intended beneficiaries of Nicora's services.
14 First, Rose's will is not before the court and there is no trust at
15 issue. Moreover, Nicora was appointed counsel for Rose in her
16 conservatorship (Doc #1 ¶21), and "[t]he purpose of a
17 conservatorship is to enable a competent person to assist the
18 conservatee in the management of [her] property." In re
19 Conservatorship of Estate of Hume, 139 Cal App 4th 393, 403 (2006)
20 (internal quotations omitted). Hence, the only intended
21 beneficiary of Nicora's legal services was Rose.

22 Because plaintiffs cannot establish the existence of a
23 legal duty owed by Nicora to them, the existence (or nonexistence)
24 of the other elements for a claim of professional negligence is
25 immaterial. Plaintiffs' claims cannot survive as a matter of law.

26 2

27 Plaintiffs' purported constitutional claim for
28 "deprivation of due process and fundamental rights" cannot survive

1 as a matter of law because plaintiff did not, and, on the facts
2 alleged, cannot show Nicora was acting under color of state law.

3 In a section 1983 civil action against a private party
4 for deprivation of constitutional rights, plaintiff must "show that
5 the alleged deprivation was committed by a person acting under
6 color of state law." West v Atkins, 487 US 42, 48 (1988). If a
7 private party's actions are fairly attributable to the government,
8 they can be subject to section 1983 liability. Kirtley v Rainey,
9 326 F3d 1088, 1092 (9th Cir 2003).

10 Plaintiffs allege that because Nicora was appointed by
11 the court, he acted under color of state law. Doc #1 ¶¶21, 88-94.
12 A court-appointed guardian, however, is not necessarily a state
13 actor. See Kirtley v Rainey, 326 F3d at 1094 (state-appointed
14 guardian ad litem did not act under color of state law); Polk
15 County v Dodson, 454 US 312, 324 (1981) (public defender did not
16 act under color of state law when performing traditional functions
17 as counsel for defendant in a criminal proceeding). Here, the
18 Monterey county superior court appointed Nicora as private legal
19 counsel for Rose in her conservatorship (Doc #1 ¶21) in order to
20 assist in the management of her property. See Cal Prob Code §
21 1470(a); Estate of Hume, 139 Cal App 4th at 403. It cannot be said
22 that as a private attorney, Nicora's actions are fairly
23 attributable to the state.

24 Accordingly, Nicora's actions, no matter how offensive to
25 plaintiffs, were those of a private attorney – not of the state
26 itself – and are not subject to section 1983 liability.

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Under a heading entitled "defamation," plaintiffs claim Nicora defamed them "to each attorney [they] attempted to hire to do a conservatorship in NY." Doc #1 ¶116. Defamation involves "the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." Smith v Maldonado, 72 Cal App 4th 637, 645 (1999) (citing Cal Civ Code §§ 45, 46). Plaintiffs allege that Nicora told others "he would not wish [p]laintiffs on his client." Doc #1 ¶116. This purported statement does not rise to the level of defamation. It is at most an unflattering statement of opinion that is not actionable as a matter of law.

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As with the other defendants, plaintiffs' intentional infliction of emotional distress allegations are grossly deficient as a matter of law. See Orders of August 11 (Doc #42) and October 10 (Doc #63). Plaintiffs have not alleged – and cannot allege – that Nicora directed his actions toward plaintiffs with the intention of causing, or acted with reckless disregard of the probability of causing, emotional distress. *Id.*

IV

Because all of plaintiffs' claims against each defendant have now been dismissed, plaintiffs' six motions to enforce subpoenas (see supra at 1) are moot. Accordingly, plaintiffs' motions to enforce subpoenas against Ann Sydes dba A&A Auction (Doc #54), Ombudsman Alliance on Aging (Doc #55), Scarr Moving and Storage (Doc #59), State Farm Insurance Company (Doc #60), Adult

1 Protective Services Department of Social Services (Doc #61) and
2 Monterey Transfer and Storage (Doc #62) are DENIED.

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4 V

5 For the reasons stated above:

6 (1) plaintiffs' medical malpractice and defamation claims
7 against Sheikh are DISMISSED WITHOUT LEAVE TO AMEND;

8 (2) plaintiffs' breach of fiduciary duty, legal
9 malpractice, deprivation of due process and fundamental rights,
10 defamation and intentional infliction of emotional distress claims
11 against Nicora are DISMISSED WITHOUT LEAVE TO AMEND; and

12 (3) plaintiffs' motions to enforce subpoenas are DENIED.

13 This order resolves all outstanding claims. The clerk is
14 directed to enter judgment for defendants and to close the file and
15 terminate all pending motions.

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17 IT IS SO ORDERED.

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20 VAUGHN R WALKER
21 United States District Chief Judge
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